

TUAN HAJI SARIP HAMID & ANOR.

v.

PATCO MALAYSIA BERHAD

SUPREME COURT, KUALA LUMPUR
TAN SRI DATO' HJ. MOHD EUSOFF BIN CHIN CJ
TAN SRI DATO' EDGAR JOSEPH Jr. FCJ
DATUK WIRA WAN YAHYA PAWAN TEH FCJ
[CIVIL APPEAL NO. 02-56 OF 1993]
30 MAY 1995

PRACTICE & PROCEDURE: *Certiorari - Application for leave to apply for certiorari to quash an award of Industrial Court - Drafting of application - Affidavit in support - Whether affidavit to contain all substantial particulars - Order 53 r. 1(2) Rules of the High Court 1980 - Whether to be satisfied.*

ADMINISTRATIVE LAW: *Judicial review - Award of Industrial Court - Application for leave to apply for certiorari - Duty to disclose material facts - Rules of the High Court O. 53 r. 1(2).*

INDUSTRIAL RELATIONS: *Industrial Court - Award - Order for reinstatement - Whether capable of being stayed by order of High Court - Industrial Relations Act 1967 s. 33B(2) - Courts of Judicature Act 1964 s. 25 - Rules of the High Court 1980 O. 53 r. 1(5).*

Pursuant to a reference made to it by the Minister, the Industrial Court made an award that the respondent had dismissed the first appellant without just cause and excuse and in consequence ordered for his reinstatement. Following the award the respondent applied for and obtained leave of the High Court to apply for *certiorari* to quash the award (the order for leave). The first appellant applied to set aside the order for leave aforesaid and argued before the High Court that the order was improperly granted on the grounds, firstly, that in obtaining the order the respondent had not disclosed certain material facts, and secondly, that there was non-compliance with O. 53 r. 1(2) Rules of the High Court 1980. The learned Judge, relying apparently on the merits of the respondent's case, dismissed the application, and pursuant to that, made an order *inter alia* staying the award of the Industrial Court. Against this dismissal and order the appellant has now appealed.

Held:

Per Edgar Joseph Jr. FCJ (delivering the judgment of the Court):

[1] Any application under O. 53 r. 1(2) must be drafted in such a way as to ensure that it contains all or substantial particulars of the facts and matters on which the applicant intends to rely in support of his application. The affidavit in support thereof must also be sufficiently detailed and comprehensive and must exhibit all the relevant documentary exhibits. The contents of the affidavit here left much to be desired so much so that there was insufficient material for the Judge below to have granted leave.

[2] As the application for leave to apply for *certiorari* is made *ex-parte*, there is a clear duty of disclosure imposed by law on the applicant, the breach of which may result in the order for leave being set aside. On the facts however the respondent was not guilty of any non-disclosure.

[3] Neither the award of the Industrial Court herein nor the reasons therefor suffered from any jurisdictional error or were in any way violative of the rules of natural justice or vitiated

a by errors of law apparent on the face of the record. Moreover there is no trace of bias. In the circumstances a substantive application for *certiorari*, had there been one, was bound to fail and so, on this further ground, the order for leave ought not to have been granted.

b [4] The learned Judge also had no power to grant the order for stay with regard to the order for reinstatement made by the Industrial Court. The order for stay was an order which the Judge was debarred from making having regard to the prohibition imposed by s. 33B(2) of the Industrial Relations Act. This section clearly overrides s. 25 of the Courts of Judicature Act 1964, read with the Schedule thereto, which confers power to the Court under its inherent jurisdiction to grant stay of execution, or O. 53 r. 1(5) of the Rules of the High Court which provides that the grant of leave to commence *certiorari* proceedings shall operate as a stay. In the circumstances the award of the Industrial Court made in favour of the first appellant ought to be, and is restored.

c [Appeal allowed. Award of Industrial Court restored].

[Bahasa Malaysia Translation of Headnotes]

d **AMALAN & PROSEDUR:** *Certiorari* - Permohonan untuk kebenaran memohon *certiorari* untuk mengenyahkan awad Mahkamah Perusahaan - Merangka permohonan - Affidavit sokongan - Samada affidavit perlu mengandungi kesemua butir-butir penting - Aturan 53 k. 1(2) Kaedah-Kaedah Mahkamah Tinggi 1980 - Samada perlu dipatuhi.

UNDANG-UNDANG PENTADBIRAN: *Kajisemula kehakiman* - Permohonan untuk kebenaran memohon *certiorari* - Tanggungjawab mendedahkan fakta-fakta material - Kaedah-Kaedah Mahkamah Tinggi 1980 A. 53 k. 1(2).

e **PERHUBUNGAN PERUSAHAAN:** Mahkamah Perusahaan - Awad - Perintah pengambilan semula - Samada boleh ditangguhkan melalui perintah Mahkamah Tinggi - Akta Perhubungan Perusahaan 1967 s. 33B(2) - Akta Mahkamah Kehakiman 1964 s. 25 - Kaedah-Kaedah Mahkamah Tinggi 1980 A. 53 k. 1(5).

f Berikutan satu rujukan yang dibuat kepadanya oleh Menteri, Mahkamah Perusahaan telah membuat awad bahawa responden telah membuang kerja perayu pertama tanpa sebab dan alasan yang munasabah dan dengan itu memerintahkan supaya beliau diambil bekerja semula. Berikutan awad tersebut responden memohon, dan berjaya memperolehi, kebenaran dari Mahkamah Tinggi untuk memohon *certiorari* bagi mengenyahkan awad berkenaan (perintah memberikan kebenaran). Perayu pertama memohon untuk mengenyahkan perintah memberikan kebenaran tersebut diatas dan berhujah di Mahkamah Tinggi bahawa pemberian perintah berkenaan adalah tidak teratur atas alasan, pertama, bahawa dalam mendapatkan perintah tersebut responden telah tidak mendedahkan beberapa fakta material tertentu, dan kedua, bahawa berlaku ketidakpatuhan terhadap A. 53 k. 1(2) Kaedah-Kaedah Mahkamah Tinggi 1980. Berdasarkan kepada merit kes responden, permohonan ini bagaimanapun ditolak oleh yang arif Hakim. Berikutan penolakan tersebut, yang arif Hakim juga membuat suatu perintah menangguhkan awad Mahkamah Perusahaan diatas. Perayu pertama dengan itu merayu terhadap penolakan dan perintah berkenaan.

h **Diputuskan:**

Oleh Edgar Joseph Jr. HMP (menyampaikan penghakiman Mahkamah):

i [1] Sebarang permohonan di bawah A. 53 k. 1(2) hendaklah dirangka dengan sebegitu cara bagi memastikan bahawa permohonan tersebut mengandungi kesemua atau sebahagian besar dari fakta-fakta dan perkara material yang hendak dipakai oleh pemohon bagi menyokong permohonannya itu. Affidavit sokongan yang dikepulkan dengan permohonan hendaklah

mengandungi butiran terperinci yang mencukupi dan haruslah juga mempamerkan segala dokumen yang relevan. Kandungan affidavit dalam kes semasa di sini adalah serba serbi kekurangan dan material yang dipaparkan sangat tidak mencukupi bagi membolehkan Hakim di bawah memberikan kebenaran.

[2] Oleh kerana permohonan untuk *certiorari* dibuat secara *ex-parte*, undang-undang telah menggalaskan ke atas pemohon tanggungjawab jelas untuk membuat pendedahan, dan pelanggaran tanggungjawab ini mungkin akan menyebabkan sesuatu perintah memberi kebenaran itu diketepikan. Berdasarkan fakta, bagaimanapun, tidak berlaku kegagalan pendedahan di sini.

[3] Awad yang diberikan oleh Mahkamah Perusahaan, beserta dengan alasan yang dikemukakan baginya, kedua-duanya tidak mengandungi apa-apa kesilapan bidangkuasa, tidak mencabuli kaedah-kaedah keadilan asasi dan tidak dikotori oleh apa-apa kesilapan undang-undang di permukaan rekod. Selain itu kesan berat sebelah juga tidak kelihatan. Dalam halkeadaan demikian, sesuatu permohonan substantif untuk mendapatkan *certiorari*, jikapun ianya dibuat, akan menemui kegagalan, dan oleh sebab itu, di atas alasan lanjut ini, perintah memberi kebenaran di sini tidak sepatutnya diberi.

[4] Hakim yang bijaksana juga tidak mempunyai kuasa untuk memberi perintah penangguhan terhadap perintah pengambilan semula Mahkamah Perusahaan. Perintah penangguhan tersebut adalah suatu perintah yang mana Hakim tersebut dilarang dari membuatnya, mengambil kira larangan yang dikenakan oleh s. 33B(2) Akta Perhubungan Perusahaan. Adalah jelas bahawa seksyen ini mengatasi s. 25 Akta Mahkamah Kehakiman 1964, dibaca dengan Jadual di situ, yang memberi kuasa kepada Mahkamah di bawah kuasa sedia adanya untuk membenarkan penangguhan pelaksanaan, ataupun A. 53 k. 1(5) Kaedah-Kaedah Mahkamah Tinggi, yang memperuntukkan bahawa pemberian kebenaran untuk memulakan prosiding *certiorari* hendaklah berkuatkuasa sebagai suatu penangguhan. Oleh hal yang demikian, awad Mahkamah Perusahaan yang dibuat untuk manafaat perayu pertama di sini perlulah, dan dengan itu, dipulihkan.

[Rayuan dibenarkan. Awad Mahkamah Perusahaan dipulihkan].

Cases referred to:

Regina v. The Secretary of State for Trade and Ors. ex parte Anderson Strathclyde plc [1983] 2 AER 233 (*refd*)

O'Reilly v. Mackman [1983] 2 AC 237 (*refd*)

Association of Bank Officers v. Malayan Commercial Banks [1990] 3 MLJ 228 (*refd*)

R. v. Governor of Pentoville Prison, ex parte Haebage (No. 2) [1987] QB 1077 (*refd*)

R. v. Secretary of State for the Home Department, ex parte Rukshanda Begum [1990] Crown Office Digest 109 (*refd*)

Stanley Ng Peng Hon v. AAF Pte. Ltd. [1979] 1 MLJ 57 (*cit*)

Edwards (Inspector of Taxes) v. Bairstow [1956] AC 14 (*refd*)

Tuan Hj. Abdul Rashid v. Patco Malaysia Berhad [1991] 1 SCR 390 (*cit*)

AMZ Corporation Sdn. Bhd. v. Sye Ah Chai [1989] 1 MLJ 238 (*dist*)

Trengganu Bus Co. Sdn. v. Transport Workers Union [1983] 1 MLJ 393 (*dist*)

R. v. Bromsgrove District Council, ex parte Kennedy [1991] Time 28 November (*refd*)

R. v. Secretary of State for the Home Department, ex parte Angur Begum [1989] COD 398 (*refd*)

Legislation referred to:

Courts of Judicature Act 1964, s. 25

Industrial Relations Act 1967, ss. 20(3), 33A, 33B(2)

Rules of the High Court 1980, O. 53 rr. 1(2), 1(5), 3

a Other source referred to:

"Judicial Review", Michael Supperstone Q.C. and James Gourdie Q.C., pp. 356 & 357

For the appellant - Lobo; M/s. Lobo & Associates

For the respondent - Ambiga Sreenevasan; M/s. Skrine & Co.

JUDGMENT

b Edgar Joseph Jr. FCJ:

c The principal question of law which arose acutely for decision in this appeal was whether the respondent Patco Malaysia Berhad ("the employer") had satisfied the requirements of O. 53 r. 1(2) of the Rules of the High Court 1980, when it had obtained leave of the High Court by order dated 22 May 1992, ("the order for leave") to apply for an order of *certiorari* to remove to the High Court for the purpose of it being quashed, an award of the Industrial Court dated 27 April 1992 ("the award of the Industrial Court") made pursuant to a finding by the Industrial Court that its employee, the first appellant Tuan Haji Sarip bin Hamid ("the employee"), had been dismissed without just cause or excuse and, in consequence, had been ordered to be reinstated as its general manager and paid various financial reliefs with retrospective effect.

d An application had then been made by the employee by notice of motion dated 30 June 1992, supported by affidavit, to set aside the order for leave on the ground, *inter alia*, that there had been non-disclosure of a material fact and non-compliance with the requirements of O. 53 r. 1(2) of the Rules of the High Court 1980, but this was dismissed and an order for stay of the award of the Industrial Court ("the order for stay") made. It was against this order of dismissal and the order for stay comprised in the judgment of the High Court dated 26 January 1993, ("the judgment of the High Court dated 26 January 1993") that the employee had appealed to this Court.

e At the conclusion of the arguments, we had allowed the appeal with costs here and in the High Court, to the employee, and set aside the judgment of the High Court, dated 26 January 1993, the effect of which was to discharge the order for leave and the order for stay, as well as, to restore the award of the Industrial Court in its entirety. The deposit paid into Court by way of security for costs of the appeal was to be refunded to the employee. We intimated then that we would be giving our reasons in writing for our decision, and this we now do.

f First of all, as regards the point about alleged non-disclosure of a material fact, this was fully argued before us and we find it unnecessary to discuss it again. Suffice to say that we found no substance whatever in the point.

g Next, we must address the remaining points in this appeal.

To put the matter in perspective, the provisions of O. 53, r. 1, which it would be convenient to reproduce are these:

h 1. (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

(2) An application for such leave must be made *ex parte* to the Court, except in vacation when it may be made to a Judge in Chambers, and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits, to be filed before the application is made, verifying the facts relied on.

i

(3) The applicant must give notice of the application for leave not later than the preceding day to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavits.

a

(4) The Court or Judge may, in granting leave, impose such terms as to costs and as to giving security as it or he thinks fit.

(5) The grant of leave under this rule to apply for an order of prohibition or an order of *certiorari* shall, if the Court or Judge so directs, operate as a stay of the proceedings in question until the determination of the application or until the Court or Judge otherwise orders.

b

Order 53, r. 3 sets out the **manner** in which an application for judicial review is made. It provides:

3. (1) Copies of the statement and of the affidavits in support of the application for leave under r. 1 must be served with the notice of motion or summons under r. 2 and, subject to para. (2), no grounds shall be relied upon or any relief sought at the hearing of the motion or summons except the grounds and relief set out in the said statement.

c

(2) The Court or Judge may on the hearing of the motion or summons allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of any affidavit of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he must give notice of his intention and of any proposed amendment of his statement to every other party, and must supply copies of such further affidavits.

d

(3) Every party to the application must supply to any other party copies of the affidavits which he proposes to use at the hearing.

The salutary advice of Lord Justice Dunn in *Regina v. The Secretary of State for Trade and Ors. ex parte Anderson Strathclyde plc* [1983] 2 AER 233 should be kept in the forefront of the mind of any lawyer who drafts the statement for purposes of O. 53 r. 1(2) and the affidavit in support thereof. What the learned Lord Justice said was this (at p. 239(f)):

e

Proceedings for judicial review are not designed for detailed enquiry into contested facts. It is for the applicants to take all proper steps to put the facts on which they rely in support of the relief claimed before the Court at the first opportunity.

f

Similarly, it is worthwhile for the draftsman to remind himself of what Lord Diplock had said in *O'Reilly v. Mackman* [1983] 2 AC 237; namely:

The facts... can seldom be a matter of relevant dispute on an application for judicial review, since the tribunal or authority's finding of fact, as distinguished from the legal consequences of the facts that they have found, are not open to review by the Court in the exercise of its supervisory powers except on the principles laid down in *Edwards (Inspector of Taxes) v. Bairstow* [1956] AC 14 at p. 36).

g

Having said that, we would add that it is a counsel of prudence for a lawyer drafting his application under O. 53 r. 1(2) to ensure that it contains substantial particulars of the facts and matters on which he intends to rely in support of his application. He should also ensure that his affidavit in support of his application is as detailed and comprehensive as the circumstances will permit, and it should exhibit all the documentary exhibits which are truly relevant and upon which he intends to rely. The object of these steps is to ensure that the Court has as complete a picture as is possible right from the start, of the case for the applicant who is seeking judicial review.

h

In *Association of Bank Officers v. Malayan Commercial Banks* [1990] 3 MLJ 228, Ajaib Singh SCJ, speaking for the Supreme Court said this:

i

- a** The guiding principles ought to be that the applicants must show *prima facie* that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application.
- Moreover, as the application for leave is made *ex parte*, there is a clear duty of disclosure, imposed by law on the applicant, the breach of which, may - depending upon the importance of the non-disclosure - result in the order for leave being set aside. (See e.g. *R. v. Governor of Pentoville Prison, ex parte Haebage* (No. 2) [1987] QB 1077).
- b**
- We are supported in our views regarding the requirements of the application for leave and the affidavit in support thereof under O. 53 r. 1(2) by the following passages in the book "*Judicial Review*" by Michael Supperstone Q.C. and James Gourdie Q.C. which we thoroughly approve of, at pp. 356 and 357:
- c** Although O. 53 is designed to be operated with a large degree of flexibility, it is necessary at the stage of preparing the Form 86A to consider the precise nature of the case that is being brought. It is necessary to identify with precision the decision that is being complained of, and the relief that is sought. The affidavit in support of the application and the statement, on Form 86A, of the grounds upon which relief is sought read together should be drafted so as to enable the Court to grasp the essential characteristics of the factual background and the nature of the arguments that the applicant intends to bring.
- d**
- Form 86A needs to be supported by 'an affidavit which verifies the facts relied on' (see O. 53 r. 3(2)(b)). In determining the extent of affidavit evidence at the leave stage, it is necessary to bear in mind two matters:
- e**
- (i) applications for leave are *ex parte*, and like all *ex parte* applications must be made *uberimae fidei*. A failure to disclose material relevant to the grant of leave would provide an opponent with cogent material on which to apply to set aside the leave and would entitle the Court (if so minded) to refuse to grant relief of its own motion. Accordingly, care must be taken to ensure that full disclosure is made of relevant material (including material as to what has transpired in any interval between the decision and the application - which may be highly germane to any issue on delay). Any explanations by the decision-maker of his decision (e.g. is an Immigration case, between a Member of Parliament and the Home Secretary) must be disclosed to the Court, as, self-evidently, must the full decision letter. The case of *R. v. Jockey Club Licensing Committee, ex parte Wright* [1991] COD 306 provides a graphic example of a material non-disclosure of facts which 'Any reasonably competent lawyer should and would have known were material matters' founding a successful application to set aside leave;
- f**
- (ii) on the other hand there can be a danger in certain types of judicial review applications of overloading the Court with documentation. In preparing the documentation it is necessary to bear in mind the limited nature of the jurisdiction of the judicial review Court, and only to exhibit documentation that is truly relevant to that jurisdiction. Cases turning on statutory construction, for example, require relatively little background information. The Courts do not welcome large amounts of extraneous material that do not advance consideration of the legal issues involved.
- g**
- h** On the question whether hearsay material may be referred to in the affidavit in support of the application for leave, the learned authors have this to say at p. 357 para. 2 - and we agree:
- i**
- It is not entirely clear whether the affidavit in support of the application for leave should be regarded as interlocutory in character or otherwise. This has a possible significance in terms of whether hearsay material may strictly be admitted. The application for leave itself is undoubtedly interlocutory; however, if leave is granted, the affidavit in support of the leave application is served together with the Notice of Motion and forms the first basis of the

applicant's case in the substantive application. As a matter of practice, a degree of common sense should be exercised in selecting the identity of the deponent. In cases where the attack is on the reasoning of a written decision as disclosing an error of statutory construction, it may be that fairly formal affidavit in support from a solicitor instructed in this case, exhibiting the decision and other essential material would suffice. At the other extreme, in an Immigration case where the issue was whether as a matter of fact the immigrant was or was not an illegal entrant, it would be highly desirable if not essential to have direct evidence at the leave stage on the disputed facts from the immigrant himself.

In *R. v. Secretary of State for the Home Department, ex parte Rukshanda Begum* [1990] Crown Office Digest 109, Dip, the Court of Appeal in England correctly laid down guidelines to be followed by the Court when considering an application for leave, in the following terms:

- (i) The Judge should grant leave if it is clear that there is a point for further investigation on a full *inter partes* basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law.
- (ii) If the Judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review.
- (iii) If on considering the papers, the Judge comes to the conclusion that he really does not know whether there is or is not an arguable case, the right course is for the Judge to invite the putative respondent to attend and make representations as to whether or not leave should be granted. That *inter partes* leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing. The test to be applied by the Judge at that *inter partes* leave hearing should be analogous to the approach adopted in deciding whether to grant leave to appeal against an arbitrator's award ... namely: if, taking account of a brief argument on either side, the Judge is satisfied that there is a case fit for further consideration, then he should grant leave.

Before us, the sufficiency of the statement contained in the notice of application for leave under O. 53 and the affidavit filed in support thereof was argued at great length and it is not necessary for us to discuss it again. Suffice to say, that having regard to the authorities cited, we were completely convinced that the contents of the affidavit left much to be desired so much so that there was insufficient material for the Judge to have granted leave.

But the matter does not rest there. Before us, Counsel for the employer made no attempt whatever to contend, by way of alternative - as she undoubtedly could have - that even if the order for leave had been granted on the strength of an application and affidavit in support which suffered from the defects alleged, and so did not comply with the requirements of O. 53 r. 1(2), yet the merits of the employer's case were such, that it could not be said that there was absolutely no arguable case to be advanced on its behalf, at the *inter partes* hearing of the substantive application for *certiorari* to be filed, and, so, on that ground, the appeal should be dismissed. But, to be fair to Counsel for the employer, she did so contend, and successfully too, in the High Court.

We therefore considered that even though, before us, Counsel for the employer had not taken the point relating to the merits of her client's case to support the judgment of the High Court dated 26 January 1993, we should take the point *suo motu*, in order to satisfy the insistent demands for justice and for the sake of completeness, especially since the employer's application for leave to apply for an order of *certiorari* aforesaid did seek to impugn the award on traditional grounds to which we shall presently refer. Moreover, the Judge himself did rely on the merits of the employer's case when dismissing the employee's application to set aside the order for leave having regard to his concluding observation which reads:

- a** In my view, by reading the statement (not in affidavit), particularly the reliefs sought and the grounds which consist of statement of Court records and the affidavit in due form, stating the facts on oath, I am of the view that O. 53 had been complied with as when they are together read, answer that an arguable case can be made out if the applicant succeeds in his proof. I therefore find that the applicant has no merit in his objection (sic).
- b** A scrutiny of the record of appeal provided shows that learned Chairman of the Industrial Court (Mr. W. Satchithanandhan) had written long, carefully worded and well reasoned grounds to justify the award.
- The pivotal point in the case being a finding of primary fact by the Industrial Court that the enforced resignation of the employee was, having regard to all the circumstances, no resignation and therefore tantamount to a dismissal in law (*Stanley Ng Peng Hon v. AAF Pte. Ltd.* [1979] 1 MLJ 57).
- c** There were also findings of fact by the Industrial Court which impugned the *bona fides* of the allegations of misconduct on the part of the employee by reason of the very late stage at which the allegations were first put to the employee. In the words of the Industrial Court:
- d** Misconduct was only put to the claimant in the Industrial Court which the claimant denied five years after his dismissal. The truth and fact of the matter is that the alleged misconduct of the claimant did not in the light of the evidence adduced operate on the mind of YB or the board of directors when YB asked the claimant to write his letter of resignation or when the ouster resolution was passed. The company was retaliating at the claimant's decision to sell his shares and wanted him to resign.
- e** It is implicit in the findings aforesaid that, contrary to the submission of Counsel for the employer in the High Court, the charges of misconduct made by the employer against the employee had been considered by the Industrial Court and found to be groundless. Such findings of fact are not open to review by the High Court or by this Court in the exercise of its supervisory powers except on the principles laid down by Lord Radcliffe in *Edwards (Inspector of Taxes) v. Bairstow* [1956] AC 14, at p. 36, and applied by Lord Diplock in *O'Reilly v. Mackman (ibid)* quoted *supra*. In our view, upon the evidence before it, the Industrial Court was entitled to make the findings of fact which it did. The fact that we might
- f** have come to a different conclusion is beside the point. Accordingly, it could not be said that any of those findings were perverse.
- Furthermore, neither the award nor the reasons therefor, suffered from any jurisdictional error or were violative of the rules of natural justice or vitiated by errors of law apparent on the face of the record. Moreover, we could detect no trace of bias. We were therefore of the
- g** view that a substantive application for *certiorari* - had there been one - was bound to fail and so, on this further ground also, the order for leave ought not to have been granted.
- At this point, we would interpolate to add, by way of background, that in a sense, the litigation arising from the disputes between the employer and the employee, has had a long and chequered history and it is to this that we should now like to refer.
- h** When the employee's case (No. 1:3/4-117/87) first came up for hearing before the Industrial Court on 6 February 1988, pursuant to a reference dated 10 March 1987 under s. 20(3) of the Industrial Relations Act 1967 ("the Act"), Counsel for the employer had raised the preliminary objection, that the employee was not a "workman" within the meaning of the Act, as the employee was a director and general manager of the employer at the material time, but the objection was over-ruled.
- i**

In consequence, the employer had successfully applied to the Industrial Court to refer to the High Court the question of law whether the Industrial Court was right in so holding, and the High Court had answered that question in favour of the employer.

a

However, on appeal to the Supreme Court that Court reversed the High Court and restored the ruling of the Industrial Court that the employee was indeed a “workman” within the meaning of the Act. (See the judgment of the Supreme Court reported under the name, *Tuan Hj. Abdul Rashid v. Patco Malaysia Berhad* [1991] 1 SCR 390, wherein the facts of the case are also set out at length).

b

Next, we must mention that on 27 May 1987, the employer had commenced proceedings in the High Court, being Civil Suit No. D-4-22-165-87, for damages and for declaratory relief, but the suit had been struck out by consent, on 10 December 1991, upon the application of the employee to strike it out for want of prosecution, no defence having been filed by the employee. (See p. 722 Appeal Record Vol. III Part C - Continuation Volume).

c

Then, on 26 May 1992 - that is, some twenty nine days after the award was made and four days after the order for leave had been obtained - the employer had filed an application under s. 33A of the Act, praying that the Industrial Court do refer seven questions of Law to the High Court, (see pp. 724/725 Appeal Record Vol. III Part C - Continuation Volume) which application is still pending.

d

We would observe, in passing, that there was thus no duty on the part of the employer at the hearing of the *ex parte* application for leave to apply for an order of *certiorari* to disclose the application for a reference under s. 33A of the Act since none was then pending before the Industrial Court. (Contrast, the case of *AMZ Corporation Sdn. Bhd. v. Sye Ah Chai* [1989] 1 MLJ 238 and *Trengganu Bus Co. Sdn. v. Transport Workers Union* [1983] 1 MLJ 393.)

e

However, at the *inter partes* hearing of the application to discharge the order for leave before Abu Mansor J (as he then was), Counsel for the employee had contended that the application for reference under s. 33A of the Act raised questions which were, in substance, the same as those arising upon the application for *certiorari*. On the other hand, Counsel for the employer had contended that the questions for decision upon the application for reference under s. 33A of the Act were wholly different from those arising upon the application for *certiorari* and she had painstakingly prepared a comparative table setting out what she considered were the differences to illustrate her contention.

f

In our view, bearing in mind that the application for reference under s. 33A of the Act is still pending before the Industrial Court, we do not consider it right or fair for us to express any view on the issues which arise for decision regarding this part of the case. The Industrial Court will have to make up its own mind as to whether to grant or refuse the application for reference under s. 33A of the Act after, of course, having heard Counsel on both sides.

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For the avoidance of doubt, we must also add that although we have held, that so far as the questions arising for decision on the present appeal are concerned, we do not consider that the award of the Industrial Court suffers from any vitiating defect, different considerations may or may not arise upon the application for reference under s. 33A of the Act. This is also a matter upon which the Industrial Court will have to make up its own mind.

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Having said that, there is a separate point which calls for consideration and this concerns the order for stay granted by the Judge of the reinstatement order made by the Industrial Court in favour of the employee. It goes without saying that having regard to our view that the application to set aside the order for leave should have been granted, the order for stay

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a falls with it. But, quite apart from this ground, there was a further ground, also, why the Judge was wrong in granting the order for stay of the reinstatement order. We refer to s. 33B(2) of the Act, which imposes an absolute bar against the making of such an order for stay, in the following terms.

Subject to the provisions of s. 33A no award of the Court for the reinstatement or re-employment of a workman shall be subject to any stay of proceedings by any Court.

b Section 33A which requires the Industrial Court, upon granting an application by any party to proceedings in which an award has been made, to refer a question of law for the determination of the High Court, to direct a stay of the whole or part of an award, was of course, of no relevance to the present case, bearing in mind that no such application had been granted.

c Now, the general powers which the Court has, in the exercise of its inherent jurisdiction, to grant a stay of execution by virtue of s. 25 of the Courts of Judicature Act 1964, read with the Schedule thereto, or for that matter, the general powers which the Court has by virtue of O. 53, r. 1(5) of the Rules of the High Court 1980, which provides that the grant of leave to commence *certiorari* proceedings shall, if the Court so directs, operate as a stay, must yield to the provisions of s. 33B(2) - quoted above - which is a specific matter relating to reinstatement or re-employment of a workman, and must therefore have over-riding effect. The Judge, therefore, had **no power** to grant the order for stay with regard to the order for reinstatement and, consequently no question of his **discretion** to do so could possibly have arisen.

e Before leaving this case, we hasten to add a word of caution and it is this: applications to set aside leave granted in judicial review proceedings should only be made in exceptional circumstances (see Popplewell J in *R v. Bromsgrove District Council, ex parte Kennedy* [1991] Times 28 November) So, for example, in *R. v. Secretary of State for the Home Department, ex parte Khalid Al-Nafeesi* [1990] COD 106, Scheimann J said that leave should be set aside where a Judge was satisfied that there was absolutely no arguable case. Similarly, in *R. v. Secretary of State for the Home Department, ex parte Angur Begum* [1989] COD 398, McCowan J applied the same test.

f To summarise the conclusions expressed above:

- (1) the Judge was right in holding that there had been no non-disclosure of a material fact on the part of Counsel for the employer;
- (2) the Judge was, however, wrong in dismissing the application to discharge the order for leave to apply for an order of *certiorari* aforesaid and the order for stay because:
 - g* (a) the statements and the affidavit filed in support of the application for leave to apply for an order of *certiorari* aforesaid, were insufficient for purposes of O. 53 r. 1(2); and
 - h* (b) in any event, quite apart from non-compliance with the provisions of O. 53 r. 1(2), having considered the merits of the employer's case, so far as the application for leave to apply for an order of *certiorari* was concerned, there was absolutely no arguable case, so that a substantive *inter partes* application for *certiorari* was bound to fail;

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- (3) in consequence, the order for stay had to be discharged, and, quite apart from that, it was an order which the Judge was debarred from making regard being had to the prohibition imposed by s. 33B(2) of the Act; *a*
- (4) the effect of our conclusions aforesaid, was to restore the award of the Industrial Court made in favour of the employee in its entirety.
- (5) the employer's application for reference under s. 33A of the Act, now pending in the Industrial Court, will have to be heard and determined on its merits. *b*
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